Document:-

A/CN.4/SR.1535

Summary record of the 1535th meeting

Topic:

State responsibility

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sent context, meant placing the State committing the wrongful act in a position in which it had no real choice as to how to act. The essence of the matter was that a State should not be able to evade responsibility simply by affirming that the act in question had been committed by another State.

28. In addition, regardless whether or not the final formulation of the article would include the phrase "in law or in fact", it was essential to cover both cases. True, the *de facto* situation was more likely to occur than the *de jure* situation, but situations were conceivable in which the dominant State had a legitimate right to act in the way it did. It was, of course, of the utmost importance to deal with *de facto* control, but in that instance responsibility should be proportionate to the extent to which such control was exercised.

29. It would be preferable to delete the word "indirect" from the whole of article 28 and not to endeavour to find a substitute for it. The word would inevitably give rise to difficulties of interpretation. The Commission was concerned solely with determining the existence of responsibility, and the use of terms such as "indirect" would merely raise questions as to whether the responsibility was qualified in some way.

30. He considered, lastly, that the proposal by Mr. Tsuruoka (A/CN.4/L.289) should certainly be taken into account by the Drafting Committee.

The meeting rose at 1 p.m.

1535th MEETING

Monday, 21 May 1979, at 3 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1–3, A/CN.4/L.289, A/CN.4/L.290)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)[1] (*continued*)

1. Mr. RIPHAGEN said that draft article 28 involved the ever-present question of the interaction of fact and law. According to any concept of justice, one set of facts—for example, a certain course of conduct on the part of a State or a given result or event—required another set of facts to be realized, for instance, *restitutio in integrum*, compensation, or even an entirely different set of facts. To categorize the first set of facts as internationally wrongful and the second as concerned with the content, form and degree of international responsibility was but a legal tool for arriving at that balance which would serve justice. Consequently, in order to determine the second set of facts, the first set had to be taken fully into account, and hence outside influences on the conduct of a State could not be entirely disregarded.

2. At the same time, all legal systems, seeking to reflect concepts of justice in a body of rules and procedures, created their own realities, which were sometimes termed legal fictions, and those realities could likewise not be disregarded with impunity. Thus the claim of States to be sovereign, with all the rights which that entailed, necessarily involved their acceptance of the obligations deriving from international responsibility, as was stated in articles 1 and 2 of the draft.[2]

3. Some of the debate which had arisen seemed to stem from the conflict between those two points of view, a conflict that had already been apparent during the Commission's discussion on article 27 at its thirtieth session; that article dealt with the reverse situation, namely, aid and assistance rendered by one State to enable another to commit an internationally wrongful act.

4. One similarity between article 27 and draft article 28, which had perhaps inspired the amendment submitted by Mr. Tsuruoka (A/CN.4/L.289), was that in both cases the combined conduct of two or more States created the illegal or wrongful state of affairs. It seemed reasonable, therefore, to accept combined international responsibility, whether "shared" or "joint and several". The choice between those two forms of responsibility was one illustration of the way in which the matters covered by draft article 28, as also by article 27, overlapped with part II of the draft, which would deal with the content, forms and degrees of responsibility. At some stage, therefore, the Commission would have to consider whether the international responsibility of State A arising out of its implication in an internationally wrongful act committed by State B had the same legal consequences for both States. In that connexion, it was worth noting that the International Court of Justice, in its Advisory Opinion in the Namibia case, had stated, on the one hand, that the continued illegal presence of South Africa in Namibia and the duty of other States not to recognize that presence did not divest South Africa of its international responsibility for its acts on Namibian territory and, on the other, that non-recognition of such a presence

[1] For text, see 1532nd meeting, para. 6.

[2] See 1532nd meeting, foot-note 2.

should not deprive the peoples of the territory of the benefits of international co-operation.[3] In addition, international practice seemed to accept measures taken by a belligerent State against the interests of the nationals of an allied State who were resident in the territory of the latter when it was under occupation by an adversary belligerent State.

5. The problems which draft article 28 had in common with article 27 stemmed, in his view, from the strict separation of primary and secondary rules of international law. For example, if the intention was to deal with the breach of an obligation deriving from a primary rule of international law, such as a rule laid down in a treaty between State A and State B, the question inevitably arose how such a treaty, being *res inter alios acta,* could affect the obligations and international responsibility of State C towards State B. It might be argued that the bilateralism underlying the *res inter alios acta* concept, and even the legal relationships arising out of the wrongful act of a State, excluded the indirect international responsibility of a third State, and to that extent he would agree with Mr. Ushakov (1533rd meeting). The basis of the international responsibility of such third State must obviously lie in its own acts as they related to the breach of an international bilateral obligation by State A towards State B. But it was difficult to determine precisely what made the acts of State C wrongful, or at least what caused that State to incur international responsibility. Apparently it had to be assumed either that State C had surrendered some of the elements of its governmental authority to State A, including use of its territory, or, alternatively, that the obligation breached by State A in its relations with State B was not, after all, a purely bilateral obligation towards State B but an international obligation whose fulfilment was required in the interests not only of States A and B, but also of the international community at large or of a regional grouping.

6. Similarly, in the case of draft article 28, it would seem that the exact position in which State C was placed to give directions or exercise control and/or the special character of the obligation, and therefore of the breach by State A in its relations to State B, were highly relevant factors in the application of the article's underlying principle. In that sense, he agreed that an attempt should be made to amalgamate paragraphs 1 and 2 of the article.

7. It would be difficult to reflect all those factors in the draft article, and he therefore considered that the Commission should direct its attention to the amendments proposed by Mr. Tsuruoka (A/CN.4/L.289). The considerations he had himself raised could then perhaps be incorporated in the commentaries to articles 27 and 28.

8. Mr. JAGOTA said that the subject-matter under consideration was of professional interest to many legal advisers throughout the world and also of practical value in promoting stable and peaceful international relations and responsible conduct by States. He was deeply impressed not only by Mr. Ago's masterly analysis of a wealth of relevant doctrine and State practice but also by the conclusions reflected in the terms of article 28, which had to be read in conjunction with article 27, for the two articles together were to constitute chapter IV of part I of the set of draft articles.

9. The concept underlying article 28 was essential to the draft, and the reasons for placing articles 27 and 28 in a separate chapter had been explained in Mr. Ago's report. Part I of the draft was concerned primarily with general principles and, in its five constituent chapters, elaborated on the origin or source of international responsibility. The fundamental norm was set out in articles 1 and 3. Article 1 specified that every internationally wrongful act of a State entailed the international responsibility of that State. Article 3 then proceeded logically to affirm that there was an internationally wrongful act of a State when (*a*) conduct consisting of an action or omission was attributable to the State under international law, and (*b*) that conduct constituted a breach of an international obligation of the State. The first part of that description of a State's internationally wrongful act was amplified in chapter II, and the second part in chapter III. In those chapters Mr. Ago had dealt with the question arising in connexion with articles 27 and 28, namely, that of attribution. If certain organs were placed at the disposal of another State by a State or by an international organization, could the conduct of such organs be attributed to a State? The answer was to be found in articles 9 and 12. Under the terms of article 9, the conduct of an organ placed at the disposal of a State by another State or by an international organization was to be considered as an act of the former State under international law if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed. In other words, an internationally wrongful act committed by organs made available to another State was attributable to that other State if the organs in question were acting in its territory and under its control. Conversely, under article 12, wrongful acts committed by the organs of one State could not be attributed to another State in whose territory they were operating if those organs were acting under the control of their own State. Chapter III was concerned with the breach of an international obligation, and article 19, which formed part of that chapter, made a major contribution to the development of the concept of an international crime, in other words, an international crime that would be recognized as such by the community of nations as a whole. That matter would also have some bearing on the problem now under discussion.

10. After completing chapters I to III, Mr. Ago had then been obliged to consider whether there were circumstances in which responsibility for an internationally wrongful act would be shared by another State or

[3] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports 1971*, pp. 54 and 56.

would be incurred exclusively by another State. The case of additional responsibility was covered by article 27, concerning situations in which aid or assistance was rendered by one State to another State for the commission of an internationally wrongful act, while article 28 covered the second aspect of the question, namely, responsibility incurred by a State other than the State in whose territory the internationally wrongful act was committed.

11. In the various cases discussed in the report, namely, dependent, vassal or protected States, States that were formally part of a federal union but had their own separate international legal personality, States under military occupation and States acting under coercion, the fundamental principles enunciated in articles 1 and 3 still applied; in other words, the entity committing the internationally wrongful act must be a State. Accordingly, a territory or an entity that was not an international legal person could not incur international responsibility or liability. In the situation envisaged in article 28, however, the international legal person would normally be one acting under certain limitations on its field of activity—for instance, limitations imposed by a constitution in the case of a federal union or limitations imposed by an agreement, as in the case of an agreement establishing a protectorate. Alternatively, the situation might relate to an entirely independent State, but one that did not enjoy freedom of action or decision and was forced by another State to adopt a certain course of conduct. Consequently article 28 could be viewed as a variant of the situation envisaged in article 1. The difference lay in the fact that, although the entity committing the internationally wrongful act was a State, additional factors required responsibility for the act to be transferred from the State committing the act to the State causing the act to be committed. Indirect responsibility was therefore simply a transfer of responsibility. The most obvious example of such a transfer of responsibility could be found in paragraph 2 of article 28, which related to an internationally wrongful act committed by a State under coercion exerted by another State. Military occupation was also a situation that could be included in paragraph 2 of the article.

12. Paragraph 1 related to the other cases cited by Mr. Ago in his report, namely, acts committed by vassal or protected States or States members of a federal union but possessing a separate international legal personality. They might involve situations in which responsibility for an internationally wrongful act lay not with the protected State but with the protecting State, because of the terms of the agreement establishing the protectorate, or situations in which, although the State was acting within its powers, it was not acting of its own volition because it was forced to take certain action under the directions and control of another State and had no option but to obey.

13. In his opinion, the use of the adjective "indirect" did not in any way diminish the degree of responsibility. It simply indicated the responsibility incurred by the State which had caused the internationally wrongful act to be committed. Even if the adjective were omitted, the responsibility would remain indirect because it did not relate to an internationally wrongful act committed directly by the State in question. At the same time, it should be remembered that in some cases a State's responsibility might be entailed both directly and indirectly. For example, it was possible that a country which dispatched armed forces to another country in violation of international law would not only be acting in breach of Article 2, paragraph 4, of the Charter of the United Nations but would also be committing an international crime under the terms of article 19 of the draft.

14. It was very important to have a clear picture of the framework in which, under articles 27 and 28, international responsibility would arise and which State would incur such responsibility. If, for example, a State sold arms to another State and there was no prohibition in international law on such sales of arms, no internationally wrongful act would have been committed and no State would incur responsibility. On the other hand, if the State sold arms in the full knowledge that the arms were to be used by the other State for the purposes of aggression, such an act would constitute aid or assistance to another State for the commission of an internationally wrongful act and would obviously be covered by article 27. If a State supplied armed forces to another State but those armed forces operated under the control of the recipient State, any wrongful acts committed by those forces would be covered by article 9, and only the recipient State would incur responsibility, because the wrongful acts would be attributable to that State alone. Wrongful acts committed by armed forces which were dispatched by one State to the territory of another State but remained under the control of the sending State would be covered by article 12—unless, of course, the two States were acting hand in hand, in which case they would be jointly responsible and the terms of article 27 would then apply. However, if armed forces were dispatched to another State and took over its organs in order to establish a puppet State, wrongful acts committed by those organs were technically attributable to them, but, under the terms of article 28, responsibility would rightly be transferred to the State which had dispatched the troops and had made use of those organs.

15. He had reached the conclusion that it was unnecessary to alter the basic concept of responsibility enunciated in article 28. In other words, it was not necessary in that article to make provision for additional or joint responsibility. Nevertheless, the transfer of responsibility should be defined very narrowly. The State in whose territory the wrongful act had been committed should not escape responsibility altogether. It should be exonerated only to the extent to which it had acted under the directions or the control of another State. A State might use the pretext that it had been acting under the directions of another State, yet the other State might easily claim that it had simply made certain suggestions and had exercised no control. In the *Romano-Americana Company* case,

cited by Mr. Ago (A/CN.4/318 and Add.1–3, para. 41), the British Government had declined to accept any responsibility for compensation arising out of destruction of the company's properties in Romania and the United States Government had finally agreed to address its claim to the Romanian Government, which in turn had agreed to assume responsibility for the acts committed by its own organs. The case showed that the victim was not necessarily left with no recourse if responsibility were confined solely to situations involving the use of force or control by another State. Again, it was possible to envisage cases in which one State received instructions from another but exceeded those instructions. Obviously, in such instances the State in receipt of the instructions could not be entirely absolved from responsibility.

16. In the light of all those considerations he proposed two variants for article 28 (A/CN.4/L.290), which did not, however, affect the substance of the text proposed by Mr. Ago:

"*Variant A*

"An internationally wrongful act committed by a State which must submit, in law or in fact, to the directions, control or coercion of another State, does not, but only to the extent of the limitation on its freedom of decision, entail the international responsibility of the State committing the wrongful act; instead it entails the international responsibility of the State under whose directions, control or coercion such wrongful act was committed.

"*Variant B*

"1. An internationally wrongful act committed by a State in a field of activity in which that State is not in possession of (complete) freedom of decision, being subject, in law or in fact, to the directions or the control of another State, does not, but only to the extent of this limitation, entail the international responsibility of the State committing the wrongful act; instead it entails the international responsibility of the State under whose direction or control such wrongful act was committed.

"2. An internationally wrongful act committed by a State under coercion exerted to that end by another State does not, but only to the extent of this limitation, entail the international responsibility of the State which acted under coercion; instead it entails the international responsibility of the State under whose coercion such wrongful act was committed."

17. With regard to the placing of articles 27 and 28, he pointed out that those articles did not extinguish the internationally wrongful act; they simply established additional responsibility or provided for the transfer of responsibility. Consequently, their rightful context was clearly part I of the draft, for the internationally wrongful act was still the point of reference in determining State responsibility. They should not be shifted to chapter V, which would deal with exemptions, i.e. circumstances which precluded wrongfulness. The choice therefore would be either to leave articles 27 and 28 to constitute chapter IV or to ally them in some way with articles 9 and 12, which dealt with situations of a similar nature and were placed in chapter II of part I. Of course, if it was decided later to alter the underlying concept of exemptions, which were to form the subject of chapter V, it might well be found appropriate to place the two articles in that chapter. Nevertheless, the matter did not require attention immediately and could well be decided later by the Drafting Committee.

18. The CHAIRMAN, speaking as a member of the Commission, said that article 28 would have to be drafted in more explicit terms, so as to answer the questions raised in the course of the debate, in particular with regard to the nature and degree of the responsibility referred to in that provision.

19. With regard to the justification for the presence of article 28 in the draft, he considered that the Commission had the duty to draft a provision that would be applicable in the various situations envisaged, for such situations did occur in international affairs. Both relationships of dependence and coercion existed and would probably continue to exist for a long time to come. Moreover, although sovereign and equal, States were living in a world of interdependence.

20. It was also important to take account of positive international law, as Mr. Riphagen had shown by emphasizing the relationship between fact and law. The Commission should therefore base its deliberations on the United Nations Charter, since the terms of the Charter offered the decisive test for saying that a given situation was lawful or unlawful. It would be necessary to formulate precise rules relying on the Charter and on positive international law, as a basis for determining the lawfulness of the situation envisaged. In that connexion, the text of article 28 proposed by Mr. Tsuruoka (A/CN.4/L.289) provided a sound basis for the drafting of language that would fit into the draft as a whole.

21. In one passage in his written presentation of article 28 (A/CN.4/318 and Add.1–3, para. 3), Mr. Ago said that the provision in question was limited to cases in which international responsibility was attributed to a State for an internationally wrongful act committed by another State, and added that

> Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g an international organization or an insurrectional movement), although intellectually conceivable, are not covered because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future.

In his own view, that reasoning was not very convincing. Since other draft articles spoke of international organizations and insurrectional movements, he doubted that that argument was tenable. Personally, he would prefer the Commission to try to work out solutions for such situations, although he realized that its work would thereby be complicated considerably.

22. Mr. USHAKOV said that he continued to hold the view that there was no such thing as indirect responsibility, not only in Soviet law, but in law in general. In internal law, admittedly, there were instances of indirect responsibility constituting exceptions to the rule. In Soviet internal law, for example, if the owner of a vehicle gave another person written permission to use his vehicle, the civil liability in the event of an accident was that of the owner. In such a case, one might speak of indirect responsibility. But in reality, it was by an act—the act of permitting another to use his vehicle—that the owner of the vehicle had assumed vicarious responsibility. In any case, he assumed only civil liability; any criminal or administrative liability was the driver's. Besides, if a person used a vehicle without the owner's permission, it was the driver who was civilly liable in the event of an accident. It followed, therefore, that any civil liability on the part of the owner of the vehicle had its source in his own act.

23. In international law, the same situation could arise, in theory, if a State accepted in advance responsibility for the acts of another State. He did not believe, however, that any such rule existed in international law. The example of master and apprentice cited by Mr. Ago (1534th meeting) was hardly pertinent, for the master was responsible for the acts of the apprentice to the extent that he was responsible for what he produced. By the same token, the manager of a factory was responsible, not for the acts of his workers, but for the production of the factory.

24. Article 28 envisaged two sorts of situations. The first, referred to in paragraph 1, was a situation of dependence of one State on another State; the second, which was the subject of paragraph 2, was a situation in which coercion was exerted by one State against another State. Mr. Ago had envisaged three possibilities in connexion with the first type of situation. He had first of all envisaged a situation of dependence of a colonial type, such as a protectorate. Actually, in such a situation, the protected State was not a State, but a "dependent territory", within the meaning of article 2, paragraph 1 (*f*), of the Vienna Convention on Succession of States in respect of Treaties, 1978,[4] namely, territory for whose international relations the protecting State was responsible. The situation was therefore not one of dependence of one State upon another.

25. The next situation considered by Mr. Ago was that of the dependence of a federated State vis-à-vis the federal State. However, that situation was likewise outside the scope of article 28, since a federated State was not a subject of international law on the same footing as the federal State.

26. The third situation envisaged, that of military occupation, might come within the scope of article 28, but only on certain conditions. For the occupied State not to be responsible for its acts, it must cease to have existed as a sovereign State. That had been the situation in Poland and Norway when they had been occupied by Nazi Germany during the Second World War. Conversely, the presence of Soviet troops in Poland at the end of the war could not be regarded as a situation of military occupation, for the control exercised by those troops had been justified by the continuance of hostilities.

27. With regard to the situation of coercion dealt with in paragraph 2 of article 28, the fact of being subjected to coercion did not, in his opinion, relieve a State of its responsibility, for a free and independent sovereign State had a duty to resist coercion and to fulfil its international obligations towards other States. In his view, the situation referred to in article 52 of the Vienna Convention[5] was entirely different: that article dealt not with relations with a third State, but with bilateral relations. The article said in effect, that, if a State forced another State to conclude a bilateral treaty with it, that treaty was void. That situation was wholly unrelated to the one contemplated in paragraph 2 of article 28.

28. Mr. PINTO said his initial uncertainty regarding draft article 28 had been due to his inability to see the connexion between the State held ultimately responsible, in other words, the dominant State, and the constituent elements of the internationally wrongful act. However, he had been much enlightened by Mr. Ago's explanations, and possibly the problem could best be resolved by drafting.

29. At the same time, he still had the impression that the article sought to deal with two somewhat separate elements: on the one hand, the manipulation of one State by another, through coercion or some other means, with a view to the commission of an internationally wrongful act, and, on the other, the defence of necessity. The question of manipulation, which was a fact of contemporary life, clearly had its place in the draft article, and the amendments submitted by Mr. Tsuruoka and Mr. Jagota would be most useful in that connexion; but he doubted whether it was either necessary or possible to deal with such a complex issue as the defence of necessity in the same article.

30. Mr. JAGOTA said that, as he read the draft article and the relevant part of the report, it dealt not with any defence or mitigating circumstances but rather with a transfer of responsibility. Thus, if a State claimed that it had committed an internationally wrongful act under pressure, it could not raise a defense of necessity, but the concept of a transfer of responsibility would come into play.

The meeting rose at 6 p.m.

[4] For the text of the Convention, see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31. The Convention is hereinafter referred to as the "1978 Vienna Convention".

[5] See 1533rd meeting, foot-note 2.